United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1350

To be Argued by ROY M. COHN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1350

B
P/S

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

PHILIP RASTELLI, ANTHONY DE STEFANO and CARL GARY PETROLE,

Defendant-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

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BRIEF IN BEHALF OF APPELLANT
PHILIP RASTELLI

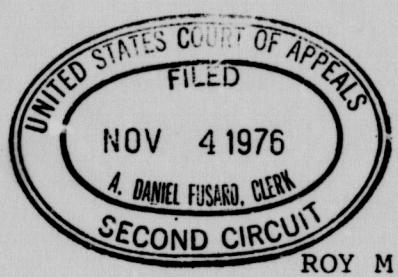

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TABLE OF CITATIONS

STATUTES CITED

UNITED STATES CONSTITUTION

ISSUES PRESENTED

1. Whether the refusal of the trial court to grant a short continuance of the trial constituted an abuse of discretion.

2. Whether the refusal of the trial court to grant a short continuance constituted a denial of the appellant's rights to a fair trial, adequate representation of counsel and/or due process under the Constitution of the United States.

3. Whether the arguments of the prosecutor improperly lent the weight of his office to them or implied knowledge of other evidence concerning the appellant which had not been presented to the jury.

4. Whether the arguments of the prosecutor were prejudicial, inflammatory and not supported by the record.

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BRIEF IN BEHALF OF APPELLANT
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PRELIMINARY STATEMENT

This brief is submitted on behalf of the appellant, Philip Rastelli, who herein appeals to this Court from the judgment of conviction entered in the United States District Court for the Eastern District of New York on August 27, 1976. Said judgment resulted from a verdict of guilty after a trial by jury before the Honorable Thomas C. Platt, and there are also other grounds for reversal.

The appellant, along with several others, was charged on March 5, 1975 with a seven count indictment. After trial, the appellant was convicted of the following counts: Count I - Sherman Anti-Trust Act (15 U.S.C. §1)

Count II - Hobbs Act (18 U.S.C. §§1951 and 2)

Count V - Hobbs Act

Count VII - Hobbs Act

Counts III and VI were dismissed during trial, and appellant was found not guilty on Count IV.

On August 27, 1976, the appellant was sentenced to one year in prison on Count I and to ten years each on

Counts II, V and VII, each to run concurrently. He was additionally fined $1,000 in Count I and $10,000 on each of the remaining Counts. The sentence was imposed pursuant to 18 U.S.C. §4205(b)(2)

STATEMENT OF FACTS

We will not attempt to burden this Court with a complete recitation of facts covering a ten year period. We have examined the brief being submitted on behalf of the appellants DeStefano and Petrole and respectfully refer the Court to said brief for a full amplification thereof. As to the evidence relating specifically to Rastelli, this will be set forth herein.

Primarily the testimony of five witnesses involved Rastelli in this case - Edward Charles Sedara, Frank Morgan, Robert Frank, Paul Spector and Paul Gellman. Sedara, Morgan and Frank all testified to basically the same facts and will be dealt with as one unit. According to the testimony, these three had problems with Spector at the Williamsberg Steel plant (83-84*). According to Sedara, Carl Gary Petrole had stated that he would have to discuss the situation with "the boss" (84).[1]

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* Numerical references are to pages in the Trial Transcript. References preceded by the letter "A" refer to pages in Rastelli's Appendix.

1. According to Morgan and Spector, Petrole claimed Rastelli was the president of the Workmen's Mobile Lunch Association (226; 346-7), but this was never substantiated, and was, in fact, in direct contravention of the evidence.

Soon thereafter a meeting took place, at which Sedara and Frank met Rastelli for the first time (85-86; 293). A conversation ensued in which Rastelli allegedly told them not to worry about Spector and suggested that in exchange for the Williamsberg Steel stop, he would endeavor to obtain some of Spector's stops for Sedara, Frank and Morgan (88-89); 295). Sedara testified that Williamsberg Steel had been Spector's stop for ten-fifteen years (161). [Rastelli was so powerful an individual that Sedara doubted that he could do anything to Spector (196-197).]

According to the testimony of appellants Petrole and DeStefano, the sole interest of Rastelli in the Association was that of an older person to whom the drivers and operators of the trucks looked up to, respected and sought out for advice. Sedara admitted that he was not a part of the mobile catering business (198), and Morgan testified that he never saw Rastelli while a member of the Association, but only at the Zarkins stop (241), and never paid any dues to Rastelli (296). Additionally Frank testified that Rastelli was never in attendance at an Association meeting (316), was not introduced as the person in charge (313) and was not even present when Frank and his partners surrendered the Williamsberg Steel stop and received Spector's stops in exchange.

The other side of the competition between Sedara-Frank-Morgan, on the one hand, and Spector on the other, was amply testified to. Spector stated that Rastelli was introduced

at the first meeting of the Association, but could not recall if he was introduced in any official capacity (348-349). On pages 352-358 of the transcript, Spector recited the events surrounding the Williamsberg Steel stop. Rastelli suggested that Sedara continue "bumping" the Sedara-Frank-Morgan partnership. ["Bumping" is an industry term for competing, and, as Judge Platt determined, is perfectly legal.] Eventually, Rastelli was able to settle the situation amicably.

Spector went on to testify concerning alleged payments made to Petrole by Quick Snack, a supply company (365) and suggestions that he pay a percentage if Spector wished the Association business (464). The only evidence of Rastelli's participation or knowledge of this is Spector's testimony as to what Petrole and Louis Rastelli said concerning monies which Philip Rastelli allegedly demanded (404-405; 414). Neither Spector nor any one else could testify that Philip Rastelli had ever demanded money from anyone nor that they had paid any sums to him.

The only direct testimony, other than from Paul Gellman, which at all implicated Rastelli, was that of Mr. Bruce, who testified that Gary Petrole had told him that Rastelli offered him a gun to use. Gellman himself testified for the government concerning Philip Rastelli. Despite allegations that Louis Rastelli had stated to him that the "man upstairs" had to receive some profit (598), he socialized with Philip Rastelli (629-630) and was neither angry with him

nor afraid of him (630-631). The only "derogatory" statement he could make was that when the government subpoenas were served, Rastelli was upset (619). This is certainly understandable in that the appellant saw all of his work going down the drain - perfectly legitimate labors in which he sought to assist the members of the industry. Even Gellman testified that he had never had any conversations with Philip Rastelli concerning cake (627-628), nor did he ever pay any money to him (628).

POINT I

THE DENIAL OF RASTELLI'S PRE-TRIAL APPLICATION FOR A CONTINUANCE WAS AN ABUSE OF DISCRETION.

It is the appellant's position that when Judge Thomas C. Platt denied Rastelli's application for a continuance in order to allow his prospective counsel to become familiar with the case and prepare a defense, this constituted such an abuse of discretion as to preclude Rastelli from obtaining a fair trial.

On March 19, 1976, Stephen Willson, Esq. of the firm of Sutter, Moffatt, Yannelli & Zevin, P.C. appeared before Judge Platt with Michael Rosen, Esq. of the firm of Saxe, Bacon & Bolan, P.C. John Joseph Sutter of that frim had been personally retained by and had personally appeared on behalf of Philip Rastelli (Transcript of March 29, 1976, 47A-48A, 51A). On March 19,1976, Mr. Willson, stated to the court:

> "Our office, and Mr. Sutter, who is currently engaged in a murder trial before Judge Zuccenga in County Court, Nassau County, has not given this case the attention it deserves. I feel, perhaps, I am primarily to blame for not bringing to this (sic) Mr. Sutter's attention. Nonetheless, the preparations have been spotty to say the least. I do not blame Mr. Rastelli for desiring to change

counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect." (Transcript of March 19, 1976, 29A-30A).

Indeed it became apparent that neither Mr. Sutter nor his firm had done anything in the preparation of the case. Counsel is advised that Sutter informed co-counsel on four or five occasions that an investigator was working on the matter, but this produced no reports or information from Sutter to Rastelli's trial counsel. Indeed, Sutter advised Rastelli that he would be ready for trial, but this was not to be.

Judge Platt, in response to Mr. Willson's admission, stated that the case was going to trial on March 29th, with or without counsel, that the engagement was set several months ago, that the court calendar was congested, that, to the best of his knowledge, Special Attorney Charles Weintraub had been kept on the government payroll solely as a result of this case, and that Sutter knew about the trial date (Transcript of March 19, 1976, 30A-31A). He concluded his rejection of Rastelli's rights by stating:

"Mr. Justice Clarke of the United States Supreme Court, when I saw him a year and a half ago in Washington, when I was sent down there after I had been appointed to the bench, said to me, at that time, 'Judge Platt, one of those things you are going to find when you get to Brooklyn

> is that every time you set a case for trial and give the attorneys a firm date, one week before the trial date you are going to get at least one application from another attorney who is going to walk in and say I want to have a substitution, and we want an adjournment as a result thereof.' That is to say, you may have that substitution but you're going to trial." (Transcript of March 19, 1976, 31A-32A).

It is respectfully submitted that none of these reasons, as put forth by Judge Platt, was sufficient to justify a denial of the continuance. Judge Platt went on to state that Mr. Sutter was responsible, that Saxe, Bacon & Bolan, P.C. did not have to take the case, that the appellant's rights were not being suffered in that everyone had requested a March 29th date and that Rastelli had retained counsel.[2] (Transcript of March 19, 1976, 31A-33A). Furthermore, Judge Platt informed the parties that Rastelli faced no prejudice and that the case was on the calendar for one year (Transcript of March 19, 1976, 34A). He stressed the inconvenience to the court (Transcript of March 19, 1976, 38A), that the well-known Sutter was perfectly capable of trying the case (Transcript of March 24, 1976, 40A), and even attempted to lay the blame upon the United States Congress:

2 Whether counsel is appointed or retained is irrelevant. Stokes v. Peyton, 437 F.2d131 (4th Cir. 1970)

> "You don't understand what I am saying. We are two judges short in this court. We have been waiting for a year and a half for a replacement for Judge Travia who resigned in November a year and a half ago. Congress for five years has promised us an additional judge. That bill is still bottled up until elections in the fall of 1976." (Transcript of March 24, 1976, 43A).

Apparently, Judge Platt cared not one iota whether or not Rastelli would be represented by adequately prepared counsel or whether Rastelli wished to obtain such representation. He elected to base his decision on off-the-cuff remarks by Justice Clarke and a much too serious concern for judicial economy and speed. We submit that such considerations are necessary, but when a defendant is faced with a complex trial involving alleged violations of the Hobbs Act and the Sherman Anit-Trust Act covering a ten year period, he should not be forced to go to trial with an attorney who has made no investigation, filed no motions or done anything in the way of assuring the defendant of a fair and proper trial with adequately prepared and available counsel.

We recognize that the rule in this Circuit is a strict one and that the granting of a continuance is a matter within the sound discretion of the trial judge; that in order to show an abuse of discretion and successfully attack such

a denial, a defendant must demonstrate that the judge acted arbitrarily and thus substantially impaired a defendant's rights. United States v. Ellenbogen, 365 F.2d 982 (2nd Cir. 1966). However, this Court, in Ellenbogen, found that:

> "We recognize, however, that a 'myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921 (1954). '...There is no mechanical test. Whether there was an abuse of discretion' must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.' Ungar v. Sarafite, supra, at 589, 84 S. Ct. at 850." United States v. Ellenbogen, supra, at 985-986.

It is the appellant's position that the reasons given for a continuance more than adequately justified the granting of such an application. The firm of Saxe, Bacon & Bolan, P.C. had only been contacted within days of the March 19th conference (Transcript of March 19, 1976, 31A). Mr. Rosen pointed out that it was a question of Rastelli's rights (ibid., 32A) that he did not believe Judge Platt would let a man go to trial (particularly in such a case) without prepared counsel (ibid., 33A), and that Mr. Rastelli's incarceration on a state conviction and his physical incapacity prevented even the defendant from aiding counsel in the

preparation of his case (ibid., 37A). This is not a case such as United States ex rel. Baskerville v. Deegan, 428 F.2d 714 (2nd Cir. 1974) where the defendant's only reason for the discharge of his counsel and a request for continuance was his "dissatisfaction" with his attorney, nor such as United States v. Abshire, 471 F.2d 116 (5th Cir. 1972) where second counsel was able to rely on the preparation of first counsel, the latter of whom was actually present during the trial. As this Court has held:

> "[A defendant] 'must have the means of presenting his best defense' and to this end he 'must have complete confidence in his counsel.' Without such confidence a defendant may be better off representing himself." Maldonado v. Denno, 348 F.2d 12 (2nd Cir. 1965), citing United States v. Mitchell, 137 F.2d 1006, 1011 (2nd Cir. 1943).

Obviously, on March 19th, Rastelli justifiably had no faith in his counsel, counsel who was not available for trial and was not even prepared to go ahead if he could be present. While it might be said that Rastelli could have better represented himself, this is not the answer in a case of such complexity that it produced approximately twenty government witnesses, 2,000 pages of trial transcript and possible incarceration for the rest of his life. When this is coupled with his incarceration and his debilitating physical

condition, the need for newly engaged and prepared counsel became mandatory.

> "An accused has the right to timely and effective counsel (Powell v. Alabama 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)),who must not be denied an opportunity to confer with his client or to prepare a defense. Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940)." United States ex rel. Hussey v. LaVallee, 302 F.Supp. 305, 307-308 (E.D.N.Y. 1969).

Out of necessity, Rastelli rejected any further representation by Sutter. The record is devoid of any desire to delay the trial or to inconvenience the court. Rather it was Rastelli's realization of the seriousness of the charge and of his need for experienced counsel that prompted his decision. When he did so, it became apparent because of Sutter's failure to do virtually anything in preparation for the trial, that prompted the request for a continuance. Even the government attorneys realized the seriousness of the predicament when Mr. Weintraub candidly advised the court that:

> "The government has considered the situation as to Philip Rastelli. Yet, quite frankly, we are somewhat concerned about the situation. We have concluded that we had consented to the severance of Louis Rastelli. That should shorten this trial, Your Honor, by about a third. Instead of the anticipated six weeks in direct, I think it is fair to say the direct will be concluded in four weeks. Because of that, and because even the appearance that Mr. Rastelli may not

> have adequate representation, based on his current counsel's admission to Your Honor that he has not prepared the government would consent to a one week adjournment." (Transcript of March 24, 1976, 39A, emphasis supplied).
>
> The Court replied: "The government has no say in this matter." (ibid., 39A-40A)

It is evident that all parties attempted to accommodate the court and delay the trial for the shortest reasonably possible time. The government agreed to one week after Mr. Rosen had requested thirty days (Transcript of March 19, 1976, 36A). After the government's acquiesence, Rastelli's potential counsel would have even accepted this insufficient hiatus and pointed out the time the Court would save by Louis Rastelli's severance. (Transcript of March 24, 1976, 41A-42A). Judge Platt's position remained the same and in fact he dared this Court to disturb his ruling:

> "The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me." (ibid., 43A)

Indeed, Judge Platt had previously directed such an approach when he all but dared this Court to order a continuance:

> "You can mandamus me to the Court of Appeals, and if they say under these circumstance that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them." (ibid., 40A-41A)

Rastelli took Judge Platt's suggestion and sought relief from this Court, Rastelli v. Platt 534 F.2d 1011 (2nd Cir. 1976),wherein it was pointed out that the continuance was denied:

> "...because of an obdurate and unreasoning refusal to grant a one week's continuance in view of an undisputed collapse of defendant's right to counsel with a concession that the fault was totally apart from the defendant himself, and with the government presenting a solution which would result in an actual net saving of a week of Judge Platt's blocked out time in this trial -- Judge Platt's throwing down the gauntlet to the Court of Appeals, the President and the Congress at the expense of this hapless defendant, must call for the exercise of this Court's authority, to prevent a manifest injustice both to the defendant and to the government. (Affidavit of Thomas A. Bolan, Esq., sworn to March 26, 1976, 24A)

This Court, under the authority of Stans v. Gagliardi, 485 F.2d 1290 (2nd Cir. 1973), felt constrained to deny the petition for mandamus. Rastelli v. Platt, supra, at . However, this Court pleaded with Judge Platt

> "...that he reconsider the equities, interests and policies underlying his denial of the request for a continuance." Rastelli v. Platt, supra, at .

This Court again echoed the sentiments of the Stans case wherein it stated:

> "It should scarcely be decisive against defendant's contentions that, as Judge Gagliardi observed, this is his oldest criminal case. Although the judge is to be commended for being abreast of his criminal docket, this success has no bearing on the crucial issue whether defendants can be properly prepared for a trial on September 11.

* * *

"A postponement of trial for a few weeks would be a small price to pay for stilling complaints, even if they were unjustified, that these defendants had not been given a fair opportunity to prepare their case and for avoiding an issue which will almost certainly continue during the trial and will be presented on appeal if defendants should be convicted." Stans v. Gagliardi, supra, at 1291-1292

As Judge Lumbard said in dissent, at page 1293

"Of even more importance than the prompt disposition of a criminal case is the requirement that the trial be a fair one so that justice may be done. This principle is of such importance that it would seriously prejudice public confidence in the administration of justice were these defendants forced to commence trial at a time when they have not had enough time adequately to prepare their defense, for the reasons set out in Judge Friendly's opinion."

Thus, despite requests from all parties, including this Court, Judge Platt continued in this steadfast refusal to grant a short continuance:

"I just got word that the Court of Appeals denied the writ, but requested that it be considered under the denial of the request for a continuance, and they conceded that they have no power under Stans v. Gagliardi, to grant the writ.

Gentlemen, for the reasons I have just stated, if this thing had been properly presented to the Court of Appeals, I would think some basis would be merited, but I don't see any basis for the request. I don't think any of these were presented to the Court of Appeals." (ibid., 55A)

This last reference was to Judge Platt's sua sponte recitation (ibid., 51A-54A) as to the alleged history of the case in an attempt to justify his continual refusal. Judge Platt

excoriated John F. Lang, Esq. of Saxe, Bacon & Bolan for alleged misstatements to this Court. However, if such errors were committed, this merely serves to underscore the need this firm had to familiarize itself with the case. (Parenthetically although Judge Platt blasted the firm for not advising this Court that it did not represent Rastelli in the criminal matter (ibid, 45A), at page 2 of the Petition for Writ of Mandamus, we pointed out that "[t]o date said firm has not been officially substituted for petitioner's [Rastelli's] prior counsel.")

Judge Platt proceeded to impose a fine of $1,000 per day on Mr. Sutter (ibid., 49A). In an effort to reduce Mr. Sutter's potential liability, to accommodate all parties and to obtain at least a minimal time for preparation, Mr. Lang proposed numerous alternatives, (ibid., 60A-61A), including an adjournment from March 29th to April 1st. Even this request was denied.

We submit that the denial of the continuance was inherently prejudicial under the circumstances of this case. Appellant's trial counsel was severely handicapped by a lack of preparation, the lack of a bill of particulars and discovery and the need to learn the case almost entirely from the

government's direct case. Indeed, such a paucity of information certainly hampered Mr. Lang in his jury selection and opening to the jury. An examination of the trial transcript and particularly Mr. Lang's cross-examination of the government's witnesses clearly reveals the heavy disadvantage he was forced to labor under.

In conclusion we would ask this Court to consider the facts herein in light of two recent Circuit Court statements as to the philosophy to be considered upon an application for a continuance under such circumstances as these:

> "...we think that in the setting of today's dynamic month-by-month, if not week-by-week, developments in criminal law procedure, forty-eight hours is hardly enough for a young, inexperienced lawyer -- or a seasoned hand for that matter -- to check out both facts and law, particularly in a case involving events occurring at a locality other than the place of trial. Not the least of the things that counsel needed to have was time to consult with the accused as to the best course of action for his client. It is a mistake to think that counsel may perform his awesome role only by exposing the accused to a trial. Handicapped as counsel was by a defendant under present confinement and with a rich history of earlier state convictions, it was pretty clear that counsel could not run the risk of putting the defendant on the stand. Perhaps counsel's highest and best performance would have been to persuade the client to enter a truly voluntary plea

of guilty in the hopes of a favorable sentence. The case must therefore be reversed and remanded for further consistent proceedings." United States v. Millican, 414 F.2d 811, 814-815 (5th Cir. 1969).

So too the Sixth Circuit has stated:

"It thus became apparent that neither [defendant or counsel] had an opportunity to make any investigation or interview witnesses, nor, of course, did Mr. Kaufman [defense counsel] have an opportunity to make legal preparation in the light of such circumstances as may have been disclosed. In view of the total situation, noting particularly the fact that only ten days elapsed between the returning of the indictment and the date set for trial, it is here concluded that an abuse of discretion requiring the vacation of the judgment of conviction occurred." United States v. Ploeger, 428 F.2d 1204, 1205-1206 (6th Cir. 1970).

We submit that as far as Rastelli was concerned, the indictment was not one year old, but rather that true pre-trial proceedings only commenced on March 19, 1976. We would ask that under the authority of Millican and Ploeger that the judgment of conviction be vacated and a new trial be ordered.

This whole situation can be laid at Mr. Sutter's doorstep. This Court, in affirming an assessment of costs against Sutter (In Re Sutter, Docket No. 76-1194, Slip Op. 179 10/20/76) properly held him accountable for the punishment he inflicted upon Rastelli in this case. How is this consistent with punishing the one man who had no part in the delay--Rastelli? Rastelli was not a malingering defendant,

out on the street--he was already in jail, he had hired a top notch lawyer who had supposedly hired an investigator, and at the eleventh hour found out there was no investigator and that the lawyer had vanished for all practical purposes. He immediately came to his present counsel who immediately went to Judge Platt for a reasonable continuance. Judge Platt's response was to punish Rastelli and thus jeopardize his rights to a fair trial and adequate representation of counsel under the Fifth and Sixth Amendments of the Constitution. This issue is most timely raised now, as it was not reviewed on the mandamus petition, leaving this appeal as our only recourse. Judge Platt was given every opportunity to do the fair thing. When this court, as in Mitchell, suggested at least a week's adjournment--which was thereafter obdurately refused, the record shows our need for time was not academic. This case covered a ten year period with dozens of witnesses and complex questions of fact and law. We had no opportunity to interview, investigate or prepare, and exacerbate the problem, our client was in jail, in failing health and scarcely available to us. This court has recognized that Judge Platt's policy merely resulted in a waste of time in

his attempt to punish Sutter. This court recognized this in affirming the assessment of damages against Sutter and in commenting on Judge Platt's procedure.

> "We strongly disapprove of this procedure. Judge Platt's solution to the problem simply left everything up in the air and it served no constructive purpose. Steps have been taken to substitute the SAXE firm and to insure that the trial would begin as expeditiously as possible, and the question of possible sanctions to be imposed on Mr. Sutter should have been treated independently". In Re Sutter, supra, at 184.

POINT II

THE REMARKS OF THE PROSECUTOR ON REBUTTAL SUMMATION WERE INFLAMMATORY, PREJUDICIAL AND NOT REASONABLE INFERENCES WHICH MIGHT BE DRAWN FROM THE RECORD.

Three times during the course of his summation, the prosecutor, without support in the record, unnecessarily and prejudicially commented on Philip Rastelli's involvement in the alleged crimes and his power to control the Association. The obvious intent was to imply to the jury that behind the proof, or lack of proof, in the case, there loomed the fact that Rastelli was an under-world type man of violence, and it would be only this invitation to prejudice, dehors the record, that resulted in his conviction:

> "Well, I suggest to you, ladies and gentlemen, that the reason Gary Petrole with his smooth talk never threatened anyone is because he didn't have to, not with the power of the association behind him, not with the power of Philip Rastelli behind him. He didn't have to. The soft-spoken word was enough." (1832) Emphasis supplied)

> "And then of course there is the argument that no threats were ever made, nobody forced these drivers to move. Well, ladies and gentlemen, I say it again, if you have the power of Philip Rastelli behind you, you didn't have to beat someone over the head, your presence and your smooth talk and the velvet word was enough. The velvet word that has come out from witnesses here as respect, cooperation, agreement. Because behind that velvet word there was a velvet hammer." (1844) (Emphasis supplied)

> "Ladies and gentlemen, that fear is what required three years of investigation to penetrate this case. These roles, the roles of these men, Philip Rastelli, the power behind the throne, Petrole, the manager, the manipulator, and DeStefano, who came along and joined the conspiracy in progress, who spent his time playing cards at Easy Load for $175 a week, those are the claims charged in the counts of this indictment, ladies and gentlemen." (1850) (Emphasis supplied)

Counsel for all appellants vehemently objected to these characterizations (1863), yet to no avail. Not only were these remarks highly prejudicial and inflammatory to Rastelli--"power behind the throne," "velvet hammer and the like - but in effect the prosecutor, lending the weight of his office and implying knowledge of Rastelli beyond that placed in evidence, took unfair advantage of the appellants, the Court and the jury.

The law in this Circuit is well settled that:

> "...the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials: the prosecutor represents 'a sovereignty whose obligation is to govern impartially.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314. As Berger suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar." United States v. Spanglet, 258 F.2d 338, 342 (2nd Cir. 1958); see also: Bugros v. United States, 304 F.2d 177, 178 (2nd Cir. 1962); United States v. Holt, 108 F.2d 365, 370 (7th Cir. 1939); United States v. Sober, 281 F.2d 244, 250 (3rd Cir. 1960).

As demonstrated above, the evidence against Rastelli was exceedingly weak, and were it not for the conspiracy count, would have been inadmissible in that it consisted primarily of statements of others testifying as to what third persons had said concerning Rastelli. In a close case such

as this, where the evidence was thin and obviously troublesome to the jury in that they deliberated more than 20 hours (2042) the prejudice becomes even greater.

> "[I]t is generally held that whether improper conduct of the Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt." Jones v. United States, 338 F.2d 553, 554, fn 3 (D.C. Cir. 1964).

We submit that the inherent flimsiness of the government's case herein amplifies the prejudice as to Rastelli.

There was no evidence in the record which would permit such inference. Moreover, such remarks clearly evinced a desire on the part of the prosecutor to imply to the jury that there was more to tell about Rastelli - that he was all powerful and a man of violence. On appeal "the inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt." McMillian v. United States, 363 F.2d 165, 169 (5th Cir. 1966). Mr. Bornstein clearly desired that the jury draw more inferences from the testimony than could reasonably be inferred therefrom to Mr. Rastelli's obvious detriment.

This Court is respectfully referred to the case of United States v. Lefkowitz, 284 F.2d 310 (2nd Cir. 1960

wherein, on summation, the prosecutor characterized the defendant as living on the periphery of law and as a parasite living on the unjust earnings of others. The parallels between the Lefkowitz summation and the instant case are readily apparent. The whole theory of the government's case was that Rastelli indeed was parasitical and a man of violence and illegality. In commenting on the Lefkowitz summation, this Court observed that:

> "[T]he peculiar vice of the argument lay in the implication that the government knew a good deal about Lefkowitz dehors the instant case 'that Mr. Heller [a witness] doesn't know' and that is not evidence." United States v. Lefkowitz, supra, at 315.

We ask no less for this appellant in that a reversal and retrial be directed wherein the cautions of Lefkowitz be observed and the appellant's guilt or innocence might be determined on the evidence and not on suspicion or innuendo.

In conclusion, we must request that the appellant Rastelli be permitted to join in such arguments as put forth by the other appellants herein to the extent that they are not inconsistent with his position as asserted in this brief, particularly in reference to Point I of the brief of appellants DeStefano and Petrole wherein the sufficiency of the evidence as it applies to the statute is in doubt. We submit that when that point is read with reference to our Statement of Facts herein, the evidence as to appellant Rastelli was equally insufficient.

CONCLUSION

For the aforementioned reasons, it is respectfully requested that the judgment of conviction be reversed and that the case be remanded for a new trial not inconsistent with the findings of this Court.

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Respectfully submitted,
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